

International Association of Bridge, Structural and Ornamental Iron Workers Local 27 and Commercial Building System Corp. and Sheet Metal Workers International Association Local 207. Case 27-CD-226

October 31, 1990

DECISION AND DETERMINATION OF DISPUTE

BY MEMBERS CRACRAFT, DEVANEY, AND OVIATT

The charge in this Section 10(k) proceeding was filed January 29, 1990,¹ by the Employer, Commercial Building System Corp. (CBS), alleging that the Respondent, International Association of Bridge, Structural and Ornamental Iron Workers Local 27 (Iron Workers Local 27) violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by Sheet Metal Workers International Association Local 207 (Sheet Metal Workers Local 207). The hearing was held February 16 before Hearing Officer Michael J. Belo.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The Employer, a Wyoming corporation, is engaged in the sales and installation of buildings constructed of metal and other materials. During the past 12 months it purchased and received goods and materials valued in excess of \$50,000 directly from places outside the State of Wyoming. The parties stipulate, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Iron Workers Local 27 and Sheet Metal Workers Local 207 are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of Dispute

In December 1989, CBS signed a contract with FMC Wyoming Corporation (FMC) to erect a metal building on FMC's trona² mining site near Green River, Wyoming. At that time, Allen Christian, FMC's purchasing agent, told David Peters, vice president of sales for CBS, that FMC had employed ironworkers in

the past to erect buildings at the FMC site and that it was FMC's understanding that CBS would employ ironworkers if its bid were accepted. Peters stated that he had used both ironworkers and sheet metal workers to do such work.³ Christian told Peters, "[D]on't do anything in terms of going from one union to another that will create any problems without getting it to us in writing that it's okay and it's not going to create a problem." Peters agreed that he would.

Peters decided to subcontract the framework construction to Moriarity Construction and to use its own employees to do the "skinning" work.⁴ Peters then sought advice from various individuals about whether the skinning work should be done by ironworkers or sheet metal workers. Peters spoke to Gaylord Allen, a representative of the Wyoming Building and Construction Trades Council, who told Peters that both the ironworkers and sheet metal workers had done skinning work and that Peters could assign the work to either Union. Peters also talked to Dale Hill, a Sheet Metal Workers business agent, who claimed that the skinning work belonged to his Union and assured Peters that assigning the work to sheet metal workers would not create problems.

On January 5, Peters wrote a letter to Sheet Metal Workers Local 207, assigning the skinning work to sheet metal workers. CBS did not inform FMC in writing of its assignment, nor did Peters conduct a "pre-job conference," which was normally held with the contractors and competing unions before a work assignment was made.

On January 16 or 23, the sheet metal workers to be used by CBS were scheduled to receive safety training at the FMC site. Peters testified that before starting the training "someone" from FMC⁵ called and informed him that problems were developing with the Iron Workers, who were making jurisdictional claims on the skinning work, and "if we put Sheet Metal Workers on the job site there would be a wild cat strike." Peters decided to postpone the safety training and the skinning work until the jurisdictional problem could be resolved.

On January 24 Allen attempted to call Peters, who could not be reached, and left a message that he had spoken to Gene Bryant, FMC human resources manager, about problems involving the Sheet Metal Workers and that, "[I]t's okay now." That same day Christian called Peters and said that Peters had evidently gotten the assignment straightened out. But on January 26 Christian called again and informed Peters that

³ Neither FMC nor CBS had any collective-bargaining agreements with Iron Workers Local 27 or Sheet Metal Workers Local 207.

⁴ The "skinning" work involved installing corrugated metal panels on the building's frame.

⁵ Although Peters could not recall who called him, he testified that it probably was "Christian."

¹ All dates are in 1990 unless otherwise stated.

² Trona is an extracted raw material used in the manufacture of sodium bicarbonate.

there were still problems with the skinning work assignment.

Al Battisti, president of Steelworkers Union Local 13/214,⁶ testified that during January several ironworkers approached him about the skinning work. They had heard that sheet metal workers would be doing the work and were concerned that there had been no prejob conference before the assignment was made. They warned Battisti that “there was some rumbling going on with the Iron Workers if the Sheet Metal Workers came in.” Other ironworkers approached Battisti during this period at a coffeeshop and told him that they might not come to work if sheet metal workers came on the job.

On the morning of January 29, Lindemood,⁷ the Iron Workers steward on the FMC site, met with Battisti. Lindemood was troubled by the skinning work assignment and asked Battisti to arrange a meeting where Lindemood, representing the Iron Workers, could discuss the problem. Sometime that morning, Battisti called Bryant and Tony Dunn, FMC projects manager, and arranged a meeting for that afternoon.

In attendance at the meeting were Lindemood, Battisti, Dunn, Dean Stover, an FMC manager, and Sam Johnson, a supervisor for Mountain West Construction Co., a contractor on the FMC site. According to Battisti,⁸ Lindemood stated that he had

worked out here at FMC for over ten years as an Ironworker, and I do not want to have any disruptions with us, as contractors, towards FMC, so I am trying to get you to understand that this was not handled properly, and there should have been a pre-job on it. And we feel if there—if we can get this to a pre-job, then the Council will give us this work, which is justifiably ours.

Battisti further testified that at some point during the meeting, Lindemood also said that he “was afraid that if the Sheet Metal people come in, the Ironworkers would not come to work.” At the conclusion of the meeting Dunn agreed to contact Gaylord Allen and find out why there had not been a prejob conference and to talk to CBS.

Peters testified that he received a call from Dunn on the afternoon of January 29. Dunn told him that there was still a problem and that “if he brought sheetmetal workers on the jobsite they heard there was going to be problems on the site.” In response to being asked what those problems might be, Peters testified that Dunn replied that the ironworkers “would stay in the parking lot and not go on to the plant site if Sheet Metal Workers arrived.”

⁶Steelworkers Union Local 13/214 is the collective-bargaining representative of FMC’s production and maintenance employees.

⁷Lindemood’s first name does not appear in the record.

⁸Lindemood did not appear at the hearing.

A prejob conference was held on January 31 at which CBS decided to subcontract the skinning work to Moriarity Construction, a contractor whose employees were represented by the Iron Workers. Thereafter, Peters called Sheet Metal Workers Business Agent Dale Hill and told him that the Sheet Metal Workers were not going to do the work. Hill replied that if the Sheet Metal Workers did not get the work, CBS would be open to a lawsuit and that the Sheet Metal Workers would strike or picket the plant. Hill called Peters shortly thereafter and told him to disregard the threat.

B. *Work in Dispute*

The work in dispute involves the erection of the walls, roof, and insulation, known as “skinning,” of a predesigned steel warehouse building for FMC at its Green River trona minesite.

C. *Contentions of the Parties*

Iron Workers Local 27 contends that there is no reasonable cause to believe that it or its representatives violated Section 8(b)(4)(D) of the Act and that the present dispute is not properly before the Board. Alternatively, it contends that the factor of area practice favors a jurisdictional award to employees represented by the Iron Workers.

Sheet Metal Workers Local 207 contends that there is reasonable cause to believe that Iron Workers Local 27 violated Section 8(b)(4)(D) of the Act and that the factors of collective-bargaining agreements, efficiency and economy of operations, relative skills and safety, area practice, industry practice, employer preference and practice, and decisions⁹ favor a jurisdictional award to employees represented by the Sheet Metal Workers.

FMC contends that the factors of area practice and employer preference favor a jurisdictional award to employees represented by the Iron Workers.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated. To satisfy this requirement the evidence “must relate to conduct or speech of the Respondent or its

⁹Both Sheet Metal Workers Local 207 and Iron Workers Local 27 rely on a May 26, 1923 decision made under the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry. That decision awards “the erection of corrugated metal sheeting on steel frames construction when the sheets are simply end and side lapped” to ironworkers and all other corrugated metal sheeting to sheet metal workers. The record is unclear, however, whether the disputed work in the instant case involves the use of corrugated metal sheeting. We thus find the May 26, 1923 decision to be inapplicable to this proceeding.

representatives.”¹⁰ Sheet Metal Workers Local 207 contends that there is reasonable cause to find that Iron Workers Local 27 violated Section 8(b)(4)(D) in light of Christian’s January 16 or 23 call to Peters in which Christian referred to a wildcat strike by the Iron Workers if the Sheet Metal Workers did the skinning work; various ironworkers’ statements to Battisti that they might not come to work if sheet metal workers performed the disputed work; Lindemood’s comment at the January 29 meeting that he was “‘afraid that if the Sheet Metal people came in, the Ironworkers would not come to work’”; and Dunn’s call to Peters after that meeting informing him that if sheet metal workers came on the job the ironworkers would stay in the parking lot.

We find merit in Sheet Metal Workers Local 207’s contention that Iron Workers Local 27 Steward Lindemood’s comment at the January 29, 1990 meeting satisfies the standard of reasonable cause to believe that the Act was violated.¹¹ As noted above, at that meeting, Lindemood stated that he “‘was afraid that if the sheet metal people came in, the ironworkers would not come to work.’”¹² We find that Lindemood’s statement constitutes a veiled threat of a work stoppage if the work were not reassigned to ironworkers and thus provides reasonable cause to believe that Section 8(b)(4)(D) has been violated.¹³ We further find that there exists no agreed-on method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act.¹⁴ Accordingly, we find that this dispute is properly before the Board for determination.

¹⁰ *Operating Engineers Local 106 (E. C. Ernst)*, 137 NLRB 1746, 1751 (1962).

¹¹ We thus find it unnecessary to pass on Sheet Metal Workers Local 207’s remaining contentions in this regard.

¹² At the same meeting Lindemood made an oral claim to the “‘skinning”’ work, which had been assigned to employees represented by Sheet Metal Workers Local 207.

¹³ See *Teamsters Local 543 (Gencorp Automotive)*, 296 NLRB 798 (1989) (the union chief steward’s remarks to the employer that they had to resolve the work dispute quickly because “‘the guys are getting real anxious out there, and I don’t know what I can do to stop them. I don’t know how much longer we’ll hold this together,’” and the union international representative’s statement to the employer that “‘there are some times when I cannot control the anger of my people, especially when they feel very strongly about the actions going on,’” provided reasonable cause to believe Sec. 8(b)(4)(D) had been violated).

Our dissenting colleague’s reliance on *Sheet Metal Workers Local 38 (Corbesco)*, 295 NLRB 1069 (1989), and *Teamsters Local 82 (Champion Exposition)*, 292 NLRB 794 (1989), is misplaced. In *Corbesco* the union representative stated, “‘I could not stand idly by and watch another trade perform our work”’ and “‘I’ll just take whatever steps I have to necessary to get this work for my members.”’ In *Champion* the union representative stated that there would be “‘a problem”’ if another employer was used for a certain job. The Board found these statements “‘too vague and insubstantial to establish reasonable cause,”’ because they did not indicate a threat of illegal conduct. In the present case, however, Lindemood’s statement conveyed a specific threat of an illegal job action.

¹⁴ Iron Workers Local 27 contends that on February 22, 1990, CBS and Iron Workers Local 27 became signatory to the Wyoming Construction Stabilization Agreement, which provides for the voluntary settlement of jurisdictional disputes, and asserts that in light of that agreement the Board should refer the instant case to the settlement procedure set forth in the agreement. Sheet Metal Workers Local 207 filed a motion to strike this contention, and Iron Workers

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of the dispute.

1. Certification and the collective-bargaining agreements

There is no evidence that the Board has certified either Iron Workers Local 27 or Sheet Metal Workers Local 207 as the collective-bargaining representative for any of the employees involved here. Further, neither Iron Workers Local 27 nor Sheet Metal Workers Local 207 had a collective-bargaining agreement with the Employer to perform the disputed work at the time of Lindemood’s January 29, 1990 comment, which we have found to have provided reasonable cause to believe that Section 8(b)(4)(D) has been violated. We therefore find that the factors of certification and the collective-bargaining agreements do not favor an award of the work in dispute to employees represented by either Union.

2. Economy and efficiency of operations

Peters testified that the Employer’s general superintendent thought that sheet metal workers would perform the disputed work better than ironworkers,¹⁵ and that Ron Perkins, who worked with a plumbing and heating company in Casper, Wyoming, advised him that sheet metal workers had erected siding faster than ironworkers when both Unions were working on a construction site in Rock Springs, Wyoming. Peters further testified, however, that he had heard that ironworker apprentices had erected 80 linear feet of siding on their second day at a job on the FMC Green River site, which Peters “‘didn’t consider bad for a second day.”’ On this record, we find that the factor of economy and efficiency of operation does not favor an award of the work in dispute to the employees represented by either Union.

Local 27 filed a motion to supplement record, for rehearing and response to motion to strike. Because this agreement was not signed by the Employer until after Lindemood’s January 29, 1990 comment, which we have found to have provided reasonable cause to believe that Sec. 8(b)(4)(D) has been violated, we find that the agreement is not applicable to the instant proceeding. Accordingly, we deny Iron Workers Local 27’s motion to supplement record, for rehearing and response to motion to strike and grant Sheet Metal Workers Local 207’s motion to strike.

¹⁵ Peters testified that the Employer had not previously employed sheet metal workers to do the disputed work.

3. Relative skills

Peters testified that the disputed work was repetitive and did not require special skills to perform. Accordingly, we find that the factor of relative skills does not favor an award of the work in dispute to the employees represented by either Union.

4. Safety

Sheet Metal Workers Local 207 conducts a safety program in connection with work assigned to employees it represents. There is no evidence in the record that Iron Workers Local 27 administers such a program. We therefore find that the factor of safety favors the awarding of the work in dispute to the employees represented by Sheet Metal Workers Local 207.

5. Areawide practice

Battisti, Dunn, and Thomas Lavery, FMC plant engineering superintendent, testified that for approximately 40 years only ironworkers have erected siding at the FMC Green River site when unions were involved, except for two occasions during which this work was performed by crews composed of both ironworkers and sheet metal workers. Thus, we find that the factor of areawide practice favors awarding the work in dispute to the employees represented by Iron Workers Local 27.

6. Industrywide practice

The record indicates that sheet metal workers perform work similar to the disputed work on jobsites in 14 to 24 States, while ironworkers do this work in Wyoming and in Utah. Therefore, we find that the factor of industrywide practice favors an award of the work in dispute to the employees represented by Sheet Metal Workers Local 207.

7. Employer preference

As stated above, Peters testified that, after consulting with the Employer's general superintendent and with Ron Perkins, he preferred that sheet metal workers perform the disputed work, and on January 5, 1990, the Employer assigned the disputed work to employees represented by Sheet Metal Workers Local 207. We find, therefore, that the factor of employer preference favors an award of the disputed work to Sheet Metal Workers Local 207.

Conclusions

After considering all the relevant factors, we conclude, based on the facts in the record before us, that the employees represented by Sheet Metal Workers Local 207 are entitled to perform the work in dispute. We reach this conclusion relying on the factors of safety, industrywide practice, and employer preference.

In making this determination, we are awarding the work to employees represented by Sheet Metal Workers Local 207, not to that Union or its members. The determination is limited to the controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

1. Employees of Commercial Building System Corp., represented by Sheet Metal Workers International Association Local 207 are entitled to perform the erection of the walls, roof, and insulation, known as "skinning," of a predesigned warehouse building for FMC Wyoming Corp. at its Green River, Wyoming trona minesite.

2. International Association of Bridge, Structural and Ornamental Iron Workers Local 27 is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Commercial Building System Corp. to assign the disputed work in a manner inconsistent with this determination.

3. Within 10 days from this date International Association of Bridge, Structural and Ornamental Iron Workers Local 27 shall notify the Regional Director for Region 27 in writing whether it will refrain from forcing the Employer, by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with the determination.

MEMBER OVIATT, dissenting.

Contrary to my colleagues, I would quash the notice of hearing. My colleagues rely on a single statement attributed to Iron Workers Steward Lindemood that he was "afraid . . . ironworkers would not come to work"¹ to find reasonable cause to believe Section 8(b)(4)(D) has been violated.

Lindemood's statement must be considered in context. Lindemood asked Steelworkers President Battisti to arrange a meeting so that Lindemood could discuss the jurisdictional problem with FMC. Battisti arranged a meeting for the afternoon of January 29, 1990. At that meeting, according to Battisti, Lindemood stated that he "did not want to have any disruptions," and was "trying to get you to understand that this was not handled properly, that there should have been a pre-job [conference] on it." He said that if there were a prejob conference, then the Council (the Wyoming Building

¹ It is clear that this is the only basis for finding reasonable cause to believe that there has been an 8(b)(4)(D) violation and, therefore, that the Board has jurisdiction in this proceeding because it is the only evidence that relates to "conduct or speech of the Respondent or its representatives," *Operating Engineers Local 106 (E. C. Ernst)*, 137 NLRB 1746, 1751 (1962). There is no evidence linking the purported statements of Dunn or Christian in any way to statements made by any Iron Workers Local 27 representative, nor did they testify that they at any time received threats of job action by Local 27 if sheet metal workers performed the disputed work. Similarly, any "rumblings" referred to by Steelworkers President Battisti were by rank-and-file employees, and were not linked in any way to Iron Workers Local 27 representatives.

and Construction Trades Council) would give the ironworkers the work, which the Local believed was justifiably its.

At the conclusion of that meeting, FMC Project Manager Dunn agreed to contact Gaylord Allen (the Building and Construction Trades Council representative) and find out why there had not been a prejob conference, and to talk to CBS. Two days later, on January 31, a prejob conference was held, at which CBS decided to subcontract the skinning work to Moriarity, to whom it had already subcontracted the framework construction.

The entire thrust of Lindemood's comments at the January 29 meeting was aimed at CBS' failure to hold the customary prejob conference before assignment of the disputed work. Indeed, it appears that his point was well taken, for Project Manager Dunn then agreed to find out why no conference had been held, and 2 days later a conference was held.

In this context, I find that Lindemood's comment regarding his fear that ironworkers would not come to

work if sheet metal workers came in does not indicate that he was communicating a threat of an illegal stoppage because of the assignment—but rather the fact that the employees were upset because there was no prejob conference.² Indeed, there is no showing that his comment pertained to anything other than the employees' concern over the failure to hold the prejob conference. It certainly, does not in my view, constitute a veiled threat that the Iron Workers would take unlawful action after the holding of such a conference.

Accordingly, I dissent from my colleagues failure to quash the notice of hearing.

² See *Sheet Metal Workers Local 38 (Corbesco)*, 295 NLRB 1069 (1989); *Teamsters Local 82 (Champion Exposition)*, 292 NLRB 794 (1989).

Teamsters Local 543 (Gencorp Automotive), 296 NLRB 798 (1989), relied on by my colleagues, is clearly distinguishable. In that case the respondent made repeated comments that the Board found provided reasonable cause to believe that the Act had been violated. In contrast, in the instant case, as explained above, Lindemood's single observation, that he was afraid that ironworkers would not come to work if sheet metal workers came in, can not reasonably be construed as a threat to take unlawful action.